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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE CONTINENTAL INSURANCE
COMPANY,

Plaintiff,

v.

JOHN JOSEPH COTA; REGAL STONE
LIMITED; FLEET MANAGEMENT LTD.;
and the *M/V COSCO BUSAN*, LR/IMO Ship
No. 9231743 her engines, apparel, electronics,
tackle, boats, appurtenances, etc., *in rem*,

Defendants.

Case No. 3:08-CV-2052-SC

Related to Case Nos:
3:07-CV-5800-SC
3:07-CV-6045-SC
3:07-CV-5926-SC

**CROSS-DEFENDANT JOHN COTA'S
REPLY TO OPPOSITION OF REGAL
STONE LIMITED, FLEET
MANAGEMENT LTD. AND THE
CONTINENTAL INSURANCE
COMPANY TO MOTION TO STAY
CIVIL ACTION PENDING RESOLUTION
OF CRIMINAL PROCEEDINGS OR,
ALTERNATIVELY, TO COMPEL
ARBITRATION; DECLARATION OF
DAVID P. SCHACK**

Date: September 5, 2008
Time: 10:00 a.m.
Ctrm: 1

1 **I. INTRODUCTION.**

2 This brief replies to the oppositions of both The Continental Insurance Company
3 (“Continental”) and Regal Stone Limited and Fleet Management, Inc. (the “Vessel Interests”) to
4 Captain Cota’s Motion to Stay Civil Action Pending Resolution of Criminal Proceedings or,
5 Alternatively, to Compel Arbitration (the “Motion”). Continental’s “opposition” is in fact not an
6 opposition at all. Continental confirms that it has dismissed its claims against Captain Cota in this
7 action and intends to arbitrate those claims.¹ Most importantly, Continental favors a stay of its
8 remaining claims in this action, in the interests of judicial economy. In fact, all parties to this
9 proceeding except the Vessel Interests support a stay.

10 As set forth below, the Vessel Interests’ isolated opposition to the requested stay lacks any
11 factual or legal justification. The allegations contained in the Vessel Interests’ Counterclaim, Cross-
12 Claim and Third-Party Complaint (the “Cross-Claim”) confirm that they do in fact intend to litigate
13 the issue of whether Captain Cota engaged in “willful misconduct” in connection with the COSCO
14 BUSAN accident. This, of course, overlaps directly with the charges and allegations Captain Cota is
15 defending against in the criminal proceeding and therefore necessitates a reasonable stay. In
16 addition, a stay will avoid piecemeal litigation and serve the interests of judicial economy, as
17 expressly desired by all the remaining parties to this action. For these reasons, the stay should be
18 granted.

19 **II. ALL PARTIES – EXCEPT VESSEL INTERESTS – AGREE THAT THE CURRENT**
20 **ACTION SHOULD BE STAYED.**

21 There are essentially four parties to the above-captioned action: (i) the initial plaintiff;
22 Continental, (ii) Captain Cota; (iii) the Vessel Interests; and (iv) third party defendants The San
23 Francisco Bar Pilots and The San Francisco Bar Pilots Benevolent And Protective Association (“Bar
24 Pilots”). Notably, three out of these four parties agree that this action should be stayed – only the
25 Vessel Interests oppose it.

26
27 ¹ Captain Cota preserves his right to request that the arbitral tribunal stay any arbitration proceedings
28 pending resolution of the criminal proceedings, but agrees that any stay of the arbitration
proceedings can be addressed to the arbitrators as necessary.

1 **Cota:** The moving party, Captain Cota, obviously seeks a stay until the criminal proceedings
2 against him are completed.

3 **Bar Pilots:** The Bar Pilots agree with such a stay, as confirmed by their recently filed “Non-
4 Opposition to Defendant John J. Cota’s Motion to Stay Civil Action Pending Resolution of Criminal
5 Proceeding or, Alternatively, to Compel Arbitration.” See Declaration of David P. Schack, Ex. 1.

6 **Continental:** Indeed, even Continental, the party which initiated this action, now agrees to a
7 stay of the entire action. Continental has now dismissed all claims against Captain Cota, and agreed,
8 as it must, that such claims should be arbitrated. Moreover, Continental has expressly stated that it
9 “does not oppose a stay of the remainder of the case pending the outcome of the arbitration”
10 (Continental Brief, p. 1) and has recognized that a stay of the remainder of the action is appropriate
11 “in the interests of avoiding ‘piecemeal litigation’” (Continental Brief, p. 6).

12 Indeed, only the Vessel Interests oppose a stay, and, as discussed in Part III, *infra*, their
13 isolated position is not supported legally or factually.

14 **III. ALL RELEVANT FACTORS SUPPORT A STAY OF THE VESSEL INTERESTS’** 15 **CLAIMS.**

16 **A. The Vessel Interests’ Claims Do In Fact Substantively Overlap with the** 17 **Criminal Proceeding and Should Be Stayed Under the Well-Established** 18 **Authority.**

19 The Vessel Interests’ Opposition brief is carefully drafted to make it appear as though there
20 is no substantive overlap between this action and the criminal proceeding. However, the opposite is
21 true. One of the fundamental claims by the Vessel Interests is that they are not required to defend
22 and indemnify Captain Cota in the criminal proceeding. In an attempt to avoid their indemnity
23 obligation, the Vessel Interests, in the Second Claim for Relief in their Cross-Complaint, concede
24 that California Harbors and Navigation Code Section 1198(b) requires them to indemnify Captain
25 Cota for “negligence”, but then cite Section 1198(c), which they contend relieves them from
26 indemnifying any “willful misconduct” by Captain Cota. See Vessel Interests’ Cross-Complaint,
27 page 9, ¶ 31-34. Then, the Vessel Interests request “a determination by this Court that section

1 1198(c) does not obligate the Cross-Complainants to defend, indemnify or hold harmless Captain
2 Cota, The San Francisco Bar Pilots or The San Francisco Bar Pilots Benevolent And Protective
3 Association, or their officers or employees in the Criminal Complaint or any future criminal action
4 arising out of the Oil Spill Incident.” *Id.* (emphasis added). In other words, the Vessel Interests
5 want this Court to find that Captain Cota engaged in “willful misconduct” and that, as a result, the
6 Vessel Interests have no indemnity obligations.

7 There can be no question that, in an effort to establish willful misconduct, the Vessel
8 Interests will focus on the same factual allegations set forth in the criminal proceeding. They will
9 focus on Captain Cota’s alleged non-disclosure of medications and medical conditions during pilot
10 medical examinations. They will focus on his alleged decision to leave port in foggy conditions, his
11 alleged miscommunications with the crew, the alleged speed at which the vessel was traveling, his
12 alleged failure to accurately read electronic charts, etc. These are the exact issues which lie at the
13 heart of the criminal proceeding.

14 The prejudice to Captain Cota of responding to these allegations on two fronts,
15 simultaneously, cannot be understated. First, Captain Cota will be forced to either relinquish his
16 Fifth Amendment rights, which he has maintained throughout the criminal proceeding, or assert
17 them, thereby hindering his ability to defend himself in this action. Moreover, he will be seriously
18 disadvantaged in the criminal proceeding simply due to the time and effort he will necessarily need
19 to devote to this proceeding. Finally, there is a grave risk that the broader scope of discovery
20 permitted in civil rather than criminal actions will harm him in the criminal proceeding. This is
21 particularly true now that the Vessel Interests are a co-defendant in the criminal proceeding and have
22 publicly revealed that their main strategy is to “point the finger,” so to speak, at Captain Cota.

23 As discussed by Captain Cota in his moving papers, this is precisely the situation where the
24 courts have stayed civil proceedings until the conclusion of pending criminal proceedings. *See, e.g.,*
25 *Cadence Design Systems, Inc. v. Avant!, Inc.*, 1997 U.S. Dist. LEXIS 24147 at 4; citing *SEC v.*
26 *Dresser Industries, Inc.* 628 F.2d 1368 (D.C. Cir. 1980); *Jones v. Conte*, 2005 WL 1287017 (N. D.
27 Cal.) (stay appropriate where otherwise criminal defendant would be faced with the “difficult
28

choice” between asserting his right against self-incrimination thereby inviting prejudice in the civil case or waiving his right against self-incrimination and thereby inviting prejudice in the criminal case). Indeed, the courts have held that “the public’s interest in the integrity of the criminal case is entitled to precedence over the civil litigant” and, as such, the civil proceedings should be stayed so that the issues are litigated first in the criminal proceeding. *Jones v. Conte*, 2005 WL 1287017 (N. D. Cal.).

While the Vessel Interests suggest that “to the extent there is overlap” [between the civil and criminal actions], the Court fashion an order which permits discovery and litigation of non-overlapping issues (*See* Opposition, page 6, fn 4), they do not provide any solutions as to how such a fine line could be drawn. Excluding discovery as to Captain Cota would not solve the problem, as the same facts and claims could be explored via other witnesses. The reality is that any discovery will almost certainly delve into the facts leading up to and surrounding the accident and Captain Cota’s piloting of the vessel. Thus, the only reliable way to avoid the prejudicial impacts on the criminal proceeding outlined above is to stay this action altogether until completion of the criminal proceeding.²

² In their brief, the Vessel Interests suggest that the stay should be denied because Captain Cota participated in the depositions of crew members in a different civil proceeding arising out of the COSCO BUSAN accident. This argument is factually inaccurate and disingenuous. The true facts, of which the Court is aware, show that the Vessel Interests are taking inconsistent positions and engaging in game-playing by now opposing the stay in the within action. The United States has filed a civil action against Captain Cota and the Vessel Interests in Case No. 3:07-CV-6045-SC (hereinafter the “U.S. Action”) in which the government seeks damages arising out of the COSCO BUSAN accident. The U.S. Action has been related to the within action and is before this Court. **The Vessel Interests, in the Proposed Case Management Order filed with Court, have agreed that, in light of the criminal proceedings against Captain Cota, the U.S. Action, including discovery, should be stayed.** Schack Decl., Ex. 2. The only exception to the agreed stay in the U.S. Action was the deposition of certain crew members of the COSCO BUSAN. However, contrary to the Vessel Interests’ argument in their brief, those depositions were not taken at Captain Cota’s request or behest. Captain Cota did not notice those depositions. The government did. The Court ordered the depositions to be taken because the crew members were going to be leaving the country. Captain Cota participated in those depositions because he was informed that this would be the one and only time he would have the opportunity to depose the three crew members whose depositions had been noticed. In light of this unusual situation--i.e., the inability to gain testimony in the future from these witness because they would leave the country--this Court ordered the depositions, and the Vessel Interests and Captain Cota acknowledged that the depositions of these

Moreover, the Vessel Interests will suffer no prejudice from the stay. The criminal trial of both Captain Cota and the Vessel Interests (i.e., Fleet Management) is now set for November 17, 2008 which will occur in less than 90 days. The Vessel Interests have not articulated, and cannot articulate, any material prejudice which would result from a stay of this duration while the criminal case is completed.³

Notably, the only case the Vessel Interests cite in opposition to a stay -- *Crawford & Sons, Ltd. v. Besser*, 298 F.Supp.2d 317 (E.D.N.Y. 2004) -- actually supports issuing a stay in this action. See Opposition, page 6. Contrary to the Vessel Interests' argument that the *Crawford* court found that a stay is proper where the defendant faces *the same exact claim in both a civil and criminal case* (in that case, fraud), the court simply held that a stay is proper where "the civil and criminal cases *arise from the same underlying events*." *Id.* at 319. The court further found a stay appropriate because (i) the defendant had been indicted in the criminal case, (ii) denying the stay might undermine defendant's Fifth Amendment rights, (iii) denying the stay would prejudice either the civil or criminal case, (iv) a stay would promote efficiency and avoid duplication, and (v) a stay would serve the public's interest by preserving the integrity of the criminal case. *Id.* at 319-320. Far

crew members would be the sole exception to the agreed upon stay of the U.S. Action. Schack Decl., Ex. 2, p. 4-5. (When the depositions took place, the crew members refused to answer any questions instead asserting their Fifth Amendment rights.) Under these circumstances, it is entirely disingenuous for the Vessel Interests to argue that Captain Cota waived his right to a stay herein by virtue of the depositions of the crew members. Indeed, it is the Vessel Interests who are now taking inconsistent positions. They have agreed to a stay of the U.S. Action (including all claims and all discovery) pending resolution of the related criminal proceedings where they are defendants and where they believe the stay furthers their interests, but they now oppose a stay of their offensive claims in within action--which are appropriately stayed on the same basis as the claims in the U.S. Action--because they believe it serves their interests to take the contrary position here. The Court should not countenance this gamesmanship by the Vessel Interests, particularly where the stakes for Captain Cota are so high and the integrity of the criminal process is at stake.

³ Additionally, the Vessel Interests, as an indemnitor, occupy a position similar to an insurer. In his moving papers, Captain Cota cited authority supporting the issuance of a stay of a coverage action where an insurer seeks to adjudicate issues which could prejudice the insured in the underlying proceedings. See *Montrose Chemical Corporation of California v. Superior Court* (1993) 6 Cal.4th 287; *Metropolitan Direct Property and Casualty Insurance Company v. Synigal*, 2008 U.S. Dist. LEXIS 8916 (N.D. Cal). This line of authority likewise supports the requested stay of the Vessel Interests' claims.

1 from providing a basis for *denying* Captain Cota's stay request, *Crawford* fully supports *granting* it,
 2 as every *Crawford* factor favoring a stay is equally present here.⁴

3 **B. A Stay of this Action Until the Completion of the Cota/Continental Arbitration**
 4 **Is Within the Court's Discretion and Will Serve Judicial Economy.**

5 In his moving papers, Captain Cota sought, alternatively, an order compelling Continental to
 6 arbitrate its claims against Captain Cota and a stay of the remaining claims (including the Vessel
 7 Interests' claims) until conclusion of the arbitration. Captain Cota has, in fact, obtained the
 8 requested relief as to arbitration without the need of an order of this Court as Continental has now
 9 dismissed its claims against Cota and agreed to arbitrate. The Court should, however, stay the
 10 remainder of the action until completion of the arbitration based on the authorities cited in the
 11 moving papers.

12 As recognized by the United States Supreme Court: "[i]n some cases, of course, it may be
 13 advisable to stay litigation among the non-arbitrating parties pending the outcome of the arbitration.
 14 That decision is one left to the district court...as a matter of discretion to control its docket." *Moses*
 15 *H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 20, fn 22 (1983); *See also*
 16 *United States use of Newton v. Neumann Caribbean International, Ltd.*, 750 F.2d 1422, 1426-27 (9th
 17 Cir. 1985)(finding that "considerations of economy and efficiency fully support the District Court's
 18 determination that the third party claim [i.e. the non-party to the arbitration clause] and other matters
 19 must await the final determination made in connection with the arbitration"); *Harvey v. CTC*
 20 *Minerals, Inc.*, 199 F.3d 790, 795-96 (5th Cir. 2000). Here, Continental's claims against the Vessel
 21 Interests involve factual and legal issues that overlap with the claims against Captain Cota which
 22 must be arbitrated. For example, in the fourth cause of action against both Captain Cota and the
 23 Vessel Interests, Continental seeks declaratory relief that, if Continental has an obligation to defend
 24

25 ⁴ The other Eastern District of New York case that the Vessel Interests cite – *Hicks v. New York*, 268
 26 F.Supp.2d 238, 241 (E.D.N.Y. 2003) – is fully distinguishable. There, the court denied a stay
 27 because the stay request was not made by an indicted defendant in a criminal proceeding; in fact, the
 28 criminal defendant was not even a party to the civil action. The court found further that the civil
 defendant's reason for requesting the stay – to gain the benefit of discovery in the criminal
 proceeding – was unsupported and inappropriate. *Id.* at 7-9.

1 and indemnify Captain Cota in connection with the criminal proceedings, then the Vessel Interests
 2 must contribute to that indemnity and defense because their obligation to do so is primary pursuant
 3 to California Harbors & Navigations Code § 1198. Similarly, in its fifth cause of action for
 4 indemnity against the Vessel Interests, Continental alleges that, if it is obligated to defend and
 5 indemnify Captain Cota in connection with the criminal proceedings, then the Vessel Interests, under
 6 Harbors & Navigations Code, have an obligation to reimburse Continental for any monies paid to
 7 Captain Cota for such indemnity and defense. Thus, a threshold issue in Continental's claims
 8 against the Vessel Interests in those causes of action is whether Continental has a coverage
 9 obligation to Captain Cota under the Continental Policy for the criminal claims against Captain Cota.
 10 This issue must be resolved in the arbitration between Continental and Captain Cota, and allowing
 11 Continental's claims against the Vessel Interests to proceed prior to such determination in arbitration
 12 (and potentially adjudicate the very issue that is the subject of the arbitration) would thwart the
 13 federal policy favoring arbitrations, would create the possibility of inconsistent results and would be
 14 an inefficient and wasteful use of judicial resources. Under these circumstances, the Court has the
 15 power to, and should, stay all remaining claims in this action involving the Vessel Interests and other
 16 parties pending completion of the arbitration between Continental and Captain Cota. *Id.*; *Kroll v.*
 17 *Doctor's Associates, Inc.*, 3 F.3d 1167, 1171 (7th Cir. 1993).⁵

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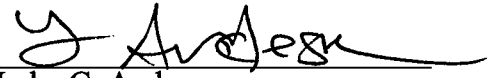
25 ⁵ Additionally, as discussed above, the Vessel Interests, as an indemnitor, occupy a position
 26 analogous to an insurer. By opposing a stay, the Vessel Interests are seeking to force Captain Cota
 27 to fight a three-front war—i.e., the criminal proceedings, the Continental arbitration and this
 28 Action—at a time when the Vessel Interests should be protecting—not attacking--Captain Cota. As
 the California Court of Appeal has recognized, an insurer should not force its insured to fight a
 multi-front war against his own insurer and the same principle applies here to the Vessel Interests.
David Kleis, Inc. v. Superior Court (1995) 37 Cal.App.4th 1035, 1044-45.

1 **V. CONCLUSION.**

2 All parties to the within action (except the Vessel Interests) are in agreement that a stay
3 should issue. The Vessel Interests' lone opposition presents no persuasive basis for the Court to
4 deviate from the well-established authority approving a stay of civil proceedings, where, as here, a
5 parallel criminal action is proceeding. The Court should grant Captain Cota' motion and issue a
6 stay.

7 DATED this 22nd day of August, 2008.

8 K&L GATES LLP

9
10 By 
11 Luke G. Anderson
12 Attorneys for Defendant
13 JOHN J. COTA
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DECLARATION OF DAVID P. SCHACK

I, David P. Schack, declare:

1. I am an attorney and am a partner in K&L Gates, attorneys of record for Cross-Defendant John J. Cota in the above referenced action. I have personal knowledge of the facts stated herein, and, if called as a witness, I could and would testify competently thereof.

2. Attached hereto and marked Exhibit 1 is a true and correct copy of Third Party Defendants San Francisco Bar Pilots and The San Francisco Bar Pilots Benevolent and Protective Association's Non-Opposition to Defendant John J. Cota's Motion to Stay Civil Action Pending Resolution of Criminal Proceeding or, Alternatively, to Compel Arbitration filed in the within action.

3. Attached hereto and marked Exhibit 2 is a true and correct copy Proposed Case Management Plan and Proposed Order filed in the United States of America v. M/V COSCO BUSAN, et al., Case No. 07-cv-6045-SC.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 22, 2008.



David P. Schack

EXHIBIT 1

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6 THE SAN FRANCISCO BAR PILOTS
BENEVOLENT AND PROTECTIVE ASSOCIATION
7

8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10

11 THE CONTINENTAL INSURANCE
COMPANY,

12 Plaintiff,

13 v.

14 JOHN JOSEPH COTA; REGAL STONE
15 LIMITED; FLEET MANAGEMENT, LTD.; and
the M/V COSCO BUSAN, LR/IMO Ship. No.
16 9231743 her engines, apparel, electronics, tackle,
boats, appurtenances, etc., *in rem*

17 Defendants.
18

19 REGAL STONE LIMITED and FLEET
20 MANAGEMENT, LTD.,

21 Counterclaimants,
22

23 v.

24 THE CONTINENTAL INSURANCE
COMPANY,

25 Counterdefendant.
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Case No. C-08-2052-SC

Related to Case No:
3:07-CV-05926-SC
3:07-CV-06045-SC
3:07-CV-05800-SC

THIRD PARTY DEFENDANTS
SAN FRANCISCO BAR PILOTS
AND THE SAN FRANCISCO BAR
PILOTS BENEVOLENT AND
PROTECTIVE ASSOCIATION'S
NON-OPPOSITION TO
DEFENDANT JOHN J. COTA'S
MOTION TO STAY CIVIL ACTION
PENDING RESOLUTION OF
CRIMINAL PROCEEDING OR,
ALTERNATIVELY, TO COMPEL
ARBITRATION

Date: September 5, 2008
Time: 10:00 a.m.
Ctm.: 1

1 REGAL STONE LIMITED and FLEET
2 MANAGEMENT, LTD.,

3 Cross-Complainants,

4 v.

5 JOHN JOSEPH COTA,

6 Cross-Defendant.

7 REGAL STONE LIMITED and FLEET
8 MANAGEMENT, LTD.,

9 Third-Party Plaintiffs,

10 v.

11 THE SAN FRANCISCO BAR PILOTS and THE
12 SAN FRANCISCO BAR PILOTS
13 BENEVOLENT AND PROTECTIVE
14 ASSOCIATION,

15 Third-Party Defendants.

16
17 Third party defendants San Francisco Bar Pilots and The San Francisco Bar Pilots
18 Benevolent and Protective Association do not oppose defendant and cross-defendant John Cota's
19 Motion to Stay Civil Action Pending Resolution of Criminal Proceeding or, Alternatively, to
20 Compel Arbitration.

21 DATED: August 21, 2008

PHILLIPS, ERLEWINE & GIVEN LLP

22
23 By: 

24 R. SCOTT ERLEWINE
25 Attorneys for Third-Party Defendants
26 SAN FRANCISCO BAR PILOTS and THE SAN
27 FRANCISCO BAR PILOTS BENEVOLENT AND
28 PROTECTIVE ASSOCIATION

EXHIBIT 2

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15 Attorneys for Defendants, Counterclaimants, and Third Party Claimants:

16 REGAL STONE LIMITED., FLEET MANAGEMENT LTD.

17 *in personam*, M/V COSCO BUSAN *in rem*

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

M/V COSCO BUSAN, LR/IMO Ship. No.
9231743 her engines, apparel, electronics,
tackle, boats, appurtenances, etc., *in rem*,
THE SHIPOWNERS' INSURANCE &
GUARANTY COMPANY LTD., REGAL
STONE LIMITED, FLEET MANAGEMENT,
LTD., AND JOHN COTA, *in personam*,

Defendants.

Case No. C 07 06045 (SC)

IN ADMIRALTY

**PROPOSED CASE MANAGEMENT
PLAN AND PROPOSED ORDER**

DATE: July 25, 2008

TIME: 10:00 a.m.

JUDGE: Hon. Samuel Conti

MEETING

Pursuant to the Court's Order and local Rule 16-9, the following parties and their
representatives conferred on July 18, 2008:

1 **A. Appearing on behalf of Plaintiff United States:**

2 R. Michael Underhill, United States Department of Justice, Torts Branch, Civil
3 Division;

4 Bradley R. O'Brien, United States Department of Justice, Environment and
5 Natural Resources Division, Environmental Enforcement Section.

6 **B. Appearing on behalf of Defendants M/V COSCO BUSAN ("COSCO
7 BUSAN"), Regal Stone Limited (Regal Stone), and Fleet
8 Management Ltd. ("Fleet Management"):**

9 John D. Giffin, Joseph A. Walsh II, John C. Cox and Nicole S. Bussi, Keesal Young
10 & Logan.

11 **C. Appearing on behalf of Defendant John Cota ("Cota"):**

12 Walter G. Coppenrath, Jr., and George M. Jones, Coppenrath & Associates.
13

14 **I. JURISDICTION AND SERVICE**

15 **Jurisdiction:** The United States brought this suit and has alleged jurisdiction
16 pursuant to the following statutes:

17 a. 28 U.S.C. § 1345;

18 b. The National Marine Sanctuaries Act ("NMSA"), 16 U.S.C. §§ 1431, *et seq.*,
19 including sections 1437 and 1443;

20 c. The Park System Resource Protection Act ("PSRPA"), 16 U.S.C. §§ 19jj, *et*
21 *seq.*, including section 19jj-2; and

22 d. The Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701, *et seq.*, including
23 section 2717.

24 e. The Clean Water Act, 33 U.S.C. § 1321(b)(7), as amended by OPA (for
25 judicially assessed civil penalties).

26 **Service:** The United States has served all parties.

27 **Counterclaim and Third Party Claim:**

28 In conjunction with their Answer to the United States' First Amended Complaint,

1 Regal Stone and Fleet Management filed a counter-claim against the United States. By
2 agreement, the United State's answer/response is due on or before September 5, 2008.

3 Regal Stone and Fleet Management also asserted a Third Party claim against the
4 State of California pursuant to FRCP 14(c) seeking to require the State of California to
5 answer the complaint of the Plaintiff United States as if the latter had sued the State of
6 California. Regal Stone and Fleet Management have further agreed with the State of
7 California to extend the time for the State to respond to August 5, 2008.

8 In a related action, 3:08-2268(SC), Regal Stone was sued by the State of
9 California, acting by and through the Department of Transportation, for which it has
10 answered and filed a counter claim against the State of California. Regal Stone will
11 move to consolidate that action with this case on the basis that both arise out of the
12 same Incident or occurrence and to the extent that the State of California may also seek
13 natural resource damages also sought by the United States.

14
15 **II. FACTS**

16 The United States' complaint alleges that on November 7, 2007, the COSCO
17 BUSAN allided with the base and/or fendering system of the "Delta Tower," one of the
18 support towers of the western span of the San Francisco-Oakland Bay Bridge (the
19 "Incident"). The allision with the Bay Bridge resulted in a rupture of the COSCO
20 BUSAN's fuel tanks, thereby allowing fuel oil to be discharged into navigable waters of
21 the United States. The United States contends that the discharge impacted adjoining
22 shorelines of San Francisco Bay, the Pacific Ocean, the Gulf of the Farallones National
23 Marine Sanctuary and the Monterey Bay National Marine Sanctuary, and units of the
24 National Park System, including, but not limited to, the Golden Gate National
25 Recreation Area, Point Reyes National Seashore, and the San Francisco Maritime
26 National Historic Park.

27 The United States' complaint alleges that at the time of the Incident, Regal Stone
28 was the owner of the COSCO BUSAN; that Fleet Management was the operator of the

1 vessel; that Cota was the pilot of COSCO BUSAN. With respect to Regal Stone and
2 Fleet, and based upon information made public in documents filed in the criminal case
3 pending against Cota, the United States further alleges, inter alia, that said Defendants'
4 crewmen of the vessel altered and/or deleted and/or created anew various documents
5 and material evidence and, with respect to operation of the vessel itself, the United
6 States further alleges that crew of the vessel were not trained by Fleet or Regal with
7 respect to performance of essential duties aboard the vessel, including operation of
8 critical navigation equipment.

9 Regal Stone and Fleet Management generally allege in their counter-claim
10 against the United States that the United States is liable for the negligent licensing of
11 Pilot John J. Cota, insofar as it failed to determine that Pilot Cota was not medically fit
12 for duty pursuant to applicable regulations and procedures. Regal Stone and Fleet
13 Management's counter-claim alleges that the United States Coast Guard is responsible
14 for the proper licensing of Pilot Cota and that it failed to adequately perform its
15 responsibilities which proximately caused the Incident and damage to Regal Stone and
16 Fleet Management. Regal Stone and Fleet Management also generally alleged that the
17 United States is liable because its Vessel Traffic Service ("VTS") gave inaccurate and
18 confusing information to the Pilot, failed to properly monitor, advise, warn and direct
19 the Pilot so as to proximately cause the allision. Regal Stone and Fleet Management
20 assert that the United States is liable to them under maritime and common law theories
21 of negligence and that they are entitled to contribution, setoff and recoupment from the
22 United States, as well as other costs, damages, losses and penalties they may incur.

23 Regal Stone and Fleet Management generally allege in their Third Party Rule
24 14(c) claim seeking to require the State of California to answer the complaint of the
25 Plaintiff United States as if the latter had sued the State of California, that the State is
26 wholly or in part liable to the United States for its negligently issuance and renewal of
27 the license of Pilot John J. Cota and that the COSCO BUSAN oil spill was proximately
28 caused by the State's failure to use due care in its licensing, supervision and training of

1 Pilot Cota. Regal Stone and Fleet Management claim they are entitled in whole or in
2 part to contribution, indemnification, and/or reimbursement for their costs, damages,
3 losses and penalties they have incurred or may incur as a result of the State's
4 negligence.

5 In signing this Case Management Plan, none of the parties herein admit, nor shall
6 they be deemed to have admitted, any allegation made by any other party and,
7 conversely, each party reserves any and all claims, rights, denials, and defenses as may
8 be set out by way or answer, responsive pleading, and/or motion.

9
10 **III. LEGAL ISSUES**

11 **United States' Position:**

12 The Defendants' liability and damages, in personam and in rem, without
13 limitation, declaratory relief, potential forfeiture, interest, and disbursements sustained
14 by the United States under the causes of action and various statutes, including judicially
15 assessed civil penalties under the Clean Water Act, 33 U.S.C. § 1321(b)(7) pled in the
16 United States' First Amended Complaint. .

17 The United States is submitting this proposed Case Management Order solely as
18 it relates to the instant civil judicial action and solely as a result of the Court's Orders
19 concerning the Case Management Plan and Case Management Conference.

20 **Defendants' COSCO BUSAN, Regal Stone and Fleet Management**

21 **Position:** Reserving their right to limit liability under 33 U.S.C. §§ 2704, 2708 and
22 2713, the position of Defendants COSCO BUSAN, Regal Stone and Fleet Management is
23 that the United States and State of California are liable for their proportionate share of
24 all damages and costs resulting from the Cosco Busan allision.

25
26 **IV. MOTIONS**

27 The parties are in general agreement that this action, including discovery,
28 presently should be stayed (with the exception of the depositions of certain crewmembers

1 of COSCO BUSAN who presently remain in the United States as a result of criminal
2 proceedings pending against Defendant Cota). Trial in the latter action is currently set
3 for October 20, 2008.

4 **The United States' Position:**

5 At the appropriate time, the United States may file dispositive motions relating to
6 the counterclaims asserted by Regal Stone and Fleet Management, as well as potential
7 motions relating to said defendants' alleged right to limit liability under provisions of
8 the Oil Pollution Act of 1990.

9 **Defendants' COSCO BUSAN, Regal Stone and Fleet Management**
10 **Position:**

11 a. Regal Stone and Fleet Management plan to file a motion to consolidate this
12 action with the related case *People of the State of California v. Regal Stone et al.*, 3:2008-
13 cv-02268-SC.

14 b. Regal Stone and Fleet Management will likely move the Court for an order to
15 consolidate or in the alternative to coordinate discovery in this matter with the other
16 related actions identified in Section X.

17 c. Regal Stone and Fleet Management reserve their right to file a motion to join
18 any indispensable party under Fed. R. Civ. Proc. 19 as necessary.

19 **Defendant John Cota's Position:** Cota may move to the stay this action or at
20 least any discovery directed to him in that the United States Department of Justice has
21 initiated a criminal proceeding against him presently set for trial in October 2008.
22 Consequently, any civil discovery requiring responses by Captain Cota would violate his
23 Fifth Amendment rights. Defendant Cota also reserves his right to move for a change of
24 venue.

25
26 **V. AMENDMENT OF PLEADINGS**

27 **United States' Position:**

28 The United States reserves the right to amend its pleading based upon

1 information discovered following the filing of the complaint, including, but not limited to,
2 information pertaining to acts and omissions of Fleet Management, Regal, and their
3 crewmen employees, as well as upon information yet to be discovered.

4 **Defendants' COSCO BUSAN, Regal Stone and Fleet Management**

5 **Position:**

6 Defendants Regal Stone and Fleet Management plan to amend their Third Party
7 14(c) claim against the State of California to address concerns raised by the State as to
8 the caption, and references to the State as a Cross-claimant.

9
10 **VI. EVIDENCE PRESERVATION**

11 The parties acknowledge and agree that the Federal Rules of Civil Procedure,
12 specifically 26(f) and this District Court's Standing Order effective since March 1, 2007
13 are sufficiently adequate with respect to preservation of evidence. Exceptions and
14 special circumstances are addressed in the proposed Case Management Plan. The
15 parties advise that they have taken and will continue to take appropriate steps to
16 preserve relevant evidence.

17
18 **VII. LITIGATION AND INITIAL DISCLOSURES**

19 The parties believe that this is a complex case, but does not believe that the
20 procedures of the Manual for Complex Litigation should be utilized.

21 The parties believe that in light of their proposal that the instant litigation be
22 stayed, and in the interest of efficiency and judicial economy, that a proposed detailed
23 case management be submitted to the Court after the stay of this litigation is no longer
24 in effect.

25 The parties intend that such future case management order shall include a
26 phased approach to litigation, with the natural resource damage component of this case
27 litigated in a latter phase. The parties further intend that initial disclosures to the
28 extent not yet made, fact and expert discovery (with the exception of certain crewmen, as

1 previously discussed), and trials shall be conducted during the appropriate phase. The
2 specific requirements shall be determined in the future case management order.

3 4 **VIII. DISCOVERY**

5 The civil depositions of three crew members were conducted in accordance with
6 the stipulation of the parties and order of the Court on May 9, 2008. Three additional
7 crew members remain in the United States as material witnesses and are scheduled to
8 give trial testimony under Rule 15 of the Fed. R. Crim. Proc. as soon as the week of July
9 21, 2008. The Parties are interested in obtaining the deposition testimony of these
10 three as yet non-deposed crew members as soon as they are released as material
11 witnesses, but before they leave the United States on the same or similar terms as the
12 May 9th stipulation. The witnesses are represented by independent counsel and are not
13 a party to this or any of the related actions. The crew members are currently invoking
14 their 5th Amendment rights based on the risks of potential criminal charges.

15 The parties believe that in light of their proposal that the instant litigation be
16 stayed, and in the interest of efficiency and judicial economy, that a proposed detailed
17 case management plan concerning discovery and related matters be submitted to the
18 Court after the stay of this litigation is no longer in effect.

19 The parties intend that such future case management order shall include a
20 phased approach to litigation, with the natural resource damage component of this case
21 litigated in a latter phase. The parties further intend that initial disclosures to the
22 extent not yet made, fact and expert discovery (with the exception of certain crewmen, as
23 previously discussed), and trials shall be conducted during the appropriate phase. The
24 specific requirements shall be determined in the future case management order.

25 26 **IX. CLASS ACTIONS**

27 Not applicable to the present action, C07-6045 SC, but see section X below with
28 respect to Chelsea, LLC v. Regal Stone, Ltd. et al, Civil Action No. 07-5800. There is

1 also a competing class action being pursued in state court.

2
3 **X. RELATED CASES**

4 Chelsea, LLC et al v. Regal Stone, Ltd. et al., Civil Action No. 07-5800; and
5 Shogren Living Trust. et al v. Regal Stone, Ltd. et al. Civil Action No. 3:07-5926.
6 *The Continental Insurance Co. v. Regal Stone, Ltd. et al.*, No. 3:08-2052
7 *The People of the State of California, Acting by and through the Department of*
8 *Transportation v. Regal Stone, Ltd. et al.*, No. 3:08-2268

9
10 **XI. RELIEF**

11 **United States' Position:**

12 The United States seeks response costs and damages, without limitations,
13 declaratory relief, potential forfeiture, interest, disbursements sustained by the United
14 States, and reserves the right to assert claims for penalties, as aforesaid.

15 Natural resource damages will be determined through a natural resource
16 damages assessment (NRDA), which is currently being conducted pursuant to
17 procedures contained in 15 CFR, Part 990. Pursuant to this process, data is being
18 collected and studies undertaken to determine the extent of injuries to natural resources
19 and will be used to select and "scale" restoration projects that will compensate the public
20 for injuries to resources and their losses or services they provide. The cost of these
21 restoration projects will determine the amount of damages. The NRDA process has to
22 date identified seven categories of potentially injured resources: birds, mammals, fish,
23 human uses and cultural resources, and rocky intertidal/sandy beach, and saltmarsh/
24 eelgrass habitats. Currently identified injuries include thousands of oiled birds, nearly
25 100 miles of oiled shoreline and habitat, and substantial lost human use days at
26 beaches, parks, and other recreation areas in the vicinity of the spill. Data collection,
27 however, is still ongoing and the scope and extent of the injuries may increase. The
28 United States intends that the ongoing NRDA process be sufficiently complete to allow

1 the phased approach to litigation to result in efficient litigation and preserve the court's
2 and the parties' resources.

3 **Defendants' COSCO BUSAN, Regal Stone and Fleet Management**

4 **Position:**

5 Defendants COSCO BUSAN, Regal Stone and Fleet Management generally deny
6 that they are liable to the United States as claimed.

7 Defendants COSCO BUSAN, Regal Stone and Fleet Management seek
8 contribution, setoff, and recoupment of its costs, damages, losses and penalties from the
9 United States and any additional relief Defendants are entitled to by law or in equity.

10 Defendants COSCO BUSAN, Regal Stone and Fleet Management seek damages,
11 in forms of contribution and indemnification for costs, damages, losses and penalties
12 from the State of California and any additional relief Defendants are entitled to by law
13 or in equity.

14 **Defendant John Cota's Position:**

15 Defendant Cota generally denies that the United States is entitled to the relief it
16 is seeking against him. Defendant Cota also contends that the Cosco Busan, Regal
17 Stone and Fleet Management are obligated by statute to defend him and hold him
18 harmless from all claims and damages.

19
20 **XII. SETTLEMENT AND ADR**

21 The parties have not participated in ADR and believe it is premature to do so.
22 They believe however, that certain aspects, particularly with respect to natural resource
23 damages, may lend themselves to resolution. Upon submission of a phase litigation
24 proposal, the parties will re-evaluate and address ADR.

25
26 **XIII. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

27 The United States does not consent to utilizing a magistrate judge.
28

1 **XIV. OTHER REFERENCES**

2 The United States does not consent to utilizing binding arbitration, a special
3 master, or the Judicial Panel of Multi District Litigation.

4
5 **XV. NARROWING OF ISSUES**

6 The parties believe a phase approach to the litigation will assist in narrowing the
7 issues.

8 **United States' Position:**

9 The United States may file dispositive motions relating to the counterclaims
10 asserted by Regal Stone and Fleet Management, as well as potential motions relating to
11 said defendants' alleged right to limit liability under the provisions of the Oil Pollution
12 Act of 1990.

13 **Defendants' COSCO BUSAN, Regal Stone and Fleet Management**
14 **Position:**

15 Defendants COSCO BUSAN, Regal Stone and Fleet Management contend that
16 the United States and the State of California played a roll in the COSCO BUSAN oil
17 spill and must be held accountable for their actions and contribute the appropriate
18 amount of damages as a result. The phased approach to this litigation will assist in
19 narrowing of these issues. Defendants also believe that this case must be consolidated
20 with *The People of the State of California, acting by and through the Department of*
21 *Transportation v. Regal Stone, Ltd. et al.*, No. 3:08-2268 and intends to bring an
22 appropriate motion. Defendants also request that the litigation be suspended until the
23 conclusion of the criminal proceedings.

24 **Defendant John Cota's Position:**

25 Defendant Cota also believes the phased litigation approach described herein shall
26 narrow the issues. Defendant Cota also contends that all discovery against him should
27 be stayed pending the final outcome of the pending criminal charges against him by the
28 federal government.

1 **XVI. EXPEDITED SCHEDULE**

2 Not applicable.

4 **XVII. SCHEDULING**

5 See above.

7 **XVIII. TRIAL**

8 The parties intend to propose a phased approach to the litigation. It is premature
9 to give an estimate of the length for trial at this point given the current criminal
10 proceedings and request for stay due to the criminal proceedings. The parties have not
11 reached agreement on whether the case could and/or would be tried to a jury or to the
12 Court. Regal Stone and Fleet Management seek a jury trial.

14 **XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS:**

15 **United States' Position:**

16 Not required

17 **Defendants COSCO BUSAN, Regal Stone and Fleet Management Position:**

18 Defendants will file their Certificates of Interested Entities or Persons required by
19 Local Rule 3-16 concurrently with the filing of this Statement.

20 **Defendant Cota Position:**

21 Defendant Cota will file his Certificate of Interested Entities or Persons required
22 by Local Rule 3-16 concurrently with the filing of this Statement.

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **XX. CONCLUSION**

2 The parties propose that the Court adopt the foregoing Case Management Plan.
3 At the appropriate time (i.e., depending on the circumstances relating to the criminal
4 proceedings) the parties will come back to the Court for further scheduling and case
5 management.

6 ///

1
2 Dated: _____ KEESAL, YOUNG & LOGAN

3 /s/ John Giffin

4 By: JOHN GIFFIN

5 Attorneys for Defendants

6 REGAL STONE, LTD., FLEET MANAGEMENT, LTD.

7 *in personam*, M/V COSCO BUSAN *in rem*

8 Dated: _____ GREGORY KATSAS
9 Acting Assistant Attorney General

10 /s/ R. Michael Underhill

11 R. MICHAEL UNDERHILL

12 Attorney in Charge, West Coast Office

13 CHAD KAUFFMAN

14 Trial Attorney

15 Torts Branch, Civil Division

16 United States Department of Justice

17 RONALD J. TENPAS

18 Assistant Attorney General

19 Environment and Natural Resources Division

20 /s/ Bradley R. O'Brien

21 BRADLEY R. O'BRIEN

22 Senior Attorney

23 Environmental Enforcement Section

24 United States Department of Justice

25 Attorneys for Plaintiff

26 United States of America

27 Dated: _____ COPPENRATH & ASSOCIATES

28 /s/ Walter g. Coppenrath Jr.

By: WALTER G. COPPENRATH, JR.

Attorneys for John Cota

[PROPOSED] ORDER

The Court, having reviewed the foregoing Proposed Case Management Plan hereby ORDERS that the schedules and agreements as proposed by the parties as set forth therein are entered as the Case Management Order for this action.

IT IS SO ORDERED.

DATED: _____

UNITED STATES DISTRICT JUDGE